

April 9, 1990

MEMORANDUM

TO: The Honorable Mitsuo Shito, Executive Director
Hawaii Housing Authority
Department of Human Services

ATTN: James Richardson, Chief Engineer

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of Government Contract Lump Sum Bid
Price Components

This is in reply to your letter, dated January 31, 1990, requesting an advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), regarding public inspection of component prices set forth in lump sum bids for the award of a public contract.

ISSUE PRESENTED

Whether, under the UIPA, component prices set forth in a lump sum bid on a public contract subject to the bidding procedures of chapter 103, Hawaii Revised Statutes, should be made available for public inspection and copying.

BRIEF ANSWER

Except to the extent such information is protected by section 92F-13, Hawaii Revised Statutes, each agency must disclose "[g]overnment purchasing information including all bid results." Haw. Rev. Stat. . 92F-12(a)(3) (Supp. 1989). Based upon the legislative history of the UIPA and construing statutes concerning the same subject matter in pari materia, we conclude that unless protected from disclosure by section 92F-13, Hawaii

Revised Statutes, both successful and unsuccessful government contract bids, which are subject to chapter 103, Hawaii Revised Statutes, must be available for public inspection.

Secondly, we conclude that disclosure of the component or unit prices set forth in a lump sum bid on a government contract will not "frustrate a legitimate government function" by revealing "confidential commercial and financial information." Based upon case law interpreting similar provisions of the federal Freedom of Information Act ("FOIA"), disclosure of unit prices contained in government contract bid documents will not result in substantial competitive harm to a bidder, or impair the ability of the contracting agency to obtain information in the future.

Furthermore, disclosure of component prices set forth in a lump sum bid on a public contract would not constitute a "clearly unwarranted invasion of personal privacy" as to "individuals" who submit such bids. Any significant privacy interest in such data is outweighed by the public interest in disclosure of government contract bids. Accordingly, we conclude that under the UIPA, the Hawaii Housing Authority must disclose to the lowest bidder, as well as the general public, the component prices set forth in unsuccessful contract bids, subject to chapter 103, Hawaii Revised Statutes, for the rehabilitation of one of its housing projects.

FACTS

The Hawaii Housing Authority ("HHA"), among other things, develops, constructs, and finances housing projects pursuant to chapter 356, Hawaii Revised Statutes. Section 356-15(a)(1), Hawaii Revised Statutes, provides that the HHA may improve and rehabilitate property. In furtherance of this grant of authority, from time to time, the HHA enters into contracts for the rehabilitation or improvement of housing projects which it owns. These contracts are subject to the competitive bidding requirements set forth in sections 103-26 to 103-38 and 103-53, Hawaii Revised Statutes. See Haw. Rev. Stat. . 356-22 (1985).

Recently, an organization which was the lowest bidder for a contract for the improvement of an HHA housing project located in Eleele, Kauai, requested to inspect the losing bidders' component prices, as contained in their unsuccessful lump sum bids, due to an apparent or alleged mistake in the calculation of its lump sum bid. Each bidder, in its bid for the

rehabilitation of the HHA housing project, included bid proposals for such items of work as replacement of concrete pavement, painting of exterior surfaces, replacement of jalousie windows, renovation of kitchens, and the installation of smoke detectors. HHA seeks an advisory opinion concerning whether, under the UIPA, the losing bidders' component prices, as set forth in their lump sum bids, are subject to inspection or protected from disclosure.

DISCUSSION

The UIPA, the State's new public records law, provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). Additionally, as part of the UIPA, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth certain government records (or categories of records) which are subject to public inspection, "as a matter of public policy." S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

With respect to government purchasing information, section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

.92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

. . . .

(3) Government purchasing information including all bid results except to the extent prohibited by section 92F-13;

Thus, under the UIPA, unless protected from disclosure under section 92F-13, Hawaii Revised Statutes, government purchasing information "including all bid results" are subject to mandatory public inspection. The use of the phrase "all bid results" raises the question whether information contained in an unsuccessful bid is a "bid result." A number of factors lead us to the conclusion that section 92F-12(a)(3), Hawaii Revised Statutes, is not limited to the inspection of winning bids. First, in previous Office of Information Practices'

("OIP") advisory opinions, we concluded that section 92F-12, Hawaii Revised Statutes, should be liberally construed to "[p]romote the public interest in disclosure." See Haw. Rev. Stat. . 92F-2 (Supp. 1989); OIP Op. Ltr. No. 89-14 (Dec. 15, 1989). Secondly, by its terms, section 92F-12(a)(3), Hawaii Revised Statutes, extends not only to "all bid results," but also requires the availability of "government purchasing information." Additionally, the enumeration in section 92F-12, Hawaii Revised Statutes, of categories of government records that are subject to public inspection, as a matter of public policy, was greatly influenced by the recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report").¹ With respect to government purchasing information, the Governor's Committee on Public Records and Privacy noted the existence of a consensus upon the availability of this information:

The next issue raised was the availability of bid documents and results. There was, however, very little dispute over this issue. It is agreed that the documents and results are available though not until the time of the award since the premature release of information might undermine the purpose of the bid process. See Comptroller Russel Nagata (II at 13) and Honolulu Managing Director Jeremy Harris (II at 116). Both also noted that even after award, there may be some material that should remain confidential either because it involves trade secrets (Nagata and Harris) or personal information (Harris).

. . . .

. . . [T]here is also, however, a desire to ensure that all State and county purchasing information is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that personal

¹ See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

information should be much of a concern and vendors who do business with the State should not have an expectation of privacy as to that sale.

Vol. I Governor's Committee Report 114 (1987) (bold in original) (emphasis added).

Thus, the Governor's Committee recommended that both bid documents and results be available for inspection as part of a new public records law. While recognizing that certain bid information might need protection from disclosure as sensitive trade information, it also noted reduced privacy concerns as to the disclosure of government purchasing information.

A review of statutes concerning public contract bids also convinces us that section 92F-12(a)(3), Hawaii Revised Statutes, extends to the inspection of all bid tenders, successful or not. Section 103-27, Hawaii Revised Statutes, provides:

.103-27 Bids; opening; rejection. The time of opening of such tenders shall be not less than five days after the last publication. All bids shall be sealed and delivered to the officer advertising therefor and shall be opened by the officer at the hour and place to be stated in the call for tenders in the presence of all bidders who attend, and may be inspected by any bidder. All bids which do not comply with the requirements of the call for tenders shall be rejected [Emphasis added.]

Section 103-27, Hawaii Revised Statutes, expressly permits all bidders to inspect all bid tenders upon their opening by the officer advertising therefor. We do not construe this statute to prohibit members of the public from inspecting the bid tenders as well. Rather, in our opinion, this statute was intended to clarify that bid tenders, upon their opening, may be inspected. Based upon the foregoing factors, we believe that unless protected from disclosure under section 92F-13, Hawaii Revised Statutes, all public contract bid information and documentation is required to be made available for public inspection by section 92F-12(a)(3), Hawaii Revised Statutes.

We now, however, must consider whether any of section 92F-13, Hawaii Revised Statutes' five exceptions to mandatory public access may apply to the inspection of public contract bid

data. As recognized by the Governor's Committee, bids may, in a given case, contain sensitive commercial or proprietary data. Section 92F-13(3), Hawaii Revised Statutes, provides that the UIPA shall not require the disclosure of "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." The legislative history of this provision demonstrates that this UIPA exception was meant to protect from disclosure "trade secrets" or "confidential commercial and financial information" and "proprietary information" if disclosure would frustrate a legitimate government function. See S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Several OIP advisory opinions have discussed the scope of section 92F-13(3), Hawaii Revised Statutes, as applied to "confidential commercial and financial information." See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 89-13 (Dec. 12, 1989); and 90-3 (Jan. 18, 1990). As pointed out in these opinions, resort to Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. . 552(b)(4) (1989) ("FOIA"), while not controlling, provides guidance in applying the UIPA's protection of "commercial and financial information" which is "confidential."

Authorities applying Exemption 4 of FOIA have established that commercial and financial information is "confidential," "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

With respect to the disclosure of unit prices or component prices contained in government contract awards, courts have concluded that disclosure of such information will not impair an agency's ability to obtain necessary information in the future. See Racal-Milgo Gov't. Sys. v. SBA, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "it is unlikely that companies will stop competing for government contracts if the prices are disclosed"). See also Buffalo Evening News v. SBA, 666 F. Supp. 467, 471 (W.D.N.Y. 1987).

Similarly, courts have found that the disclosure of unit or component prices in government contract awards will not cause

substantial competitive harm, finding that disclosure of the prices would not directly reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, and the possibility of competitive harm was, thus, too speculative. See Acumenics Research & Technology, Inc. v. Dep't. of Justice, 843 F.2d 800, 808 (4th Cir. 1988) for a thorough analysis of the possible effects of the disclosure of a government contract bidder's unit prices. Likewise, in the absence of a showing of competitive harm, the court in Racal-Milgo denied Exemption 4 protection for prices charged the government and went on to state that "[d]isclosure of prices charged the Government is a cost of doing business with the Government." Id. at 6. In AT&T Information Sys. v. GSA, 627 F. Supp. 1396, 1043 (D.D.C. 1986), the court recognized the "strong public interest in release of component and aggregate prices in Government contract awards" and, thus, rejected Exemption 4 protection for unit prices.

Thus, case law interpreting provisions of FOIA's Exemption 4 has generally denied protection for unit and component prices set forth in government contract awards. Like the courts interpreting Exemption 4 of the FOIA, we do not believe the disclosure of unit or component prices set forth in lump sum bids would result in competitive harm to a bidder or deter companies from conducting business with the government. Therefore, the disclosure of this information would not result in the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes.

Next, we must consider whether component or unit prices set forth in government contract bids are protected from disclosure under section 92F-13(1), Hawaii Revised Statutes, which provides that the UIPA does not require disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Only "natural persons" have cognizable privacy interests under the UIPA. See Haw. Rev. Stat. . 92F-3 and 92F-14(a) (Supp. 1989). Additionally, section 92F-14(b)(6), Hawaii Revised Statutes, does establish that "individuals" have a significant privacy interest in information describing their "finances," "income," and "financial history or activities." Assuming that unit prices set forth in government contract bids, which are submitted by individuals, constitute information describing that bidder's income or financial activities, their significant privacy interest in such data must be balanced against the

public interest in disclosure, to determine whether disclosure of that information would be "clearly unwarranted." See Haw. Rev. Stat. . 92F-14(a) (Supp. 1989).

We have serious doubts concerning whether section 92F-12(a)(3), Hawaii Revised Statutes, was intended to allow the non-disclosure of government contract bid information under the UIPA's privacy exception. As noted in the Governor's Committee Report, "vendors who do business with the State should not have an expectation of privacy as to that sale." Governor's Committee Report at 116. In our opinion, the Legislature made the exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, applicable to government purchasing information and bid results because in some circumstances, the disclosure of this information may result in the "frustration of a legitimate government function" by revealing "confidential commercial and financial information," "trade secrets," or "proprietary information." Alternatively, in other cases, such information may be protected by specific state or federal laws under section 92F-13(4), Hawaii Revised Statutes.

Regardless, we conclude that any personal privacy interest that an "individual" may have in a government contract bid is outweighed by the public interest in disclosure. First, chapter 103, Hawaii Revised Statutes, establishes that it is the public policy of this State that public works contracts be awarded pursuant to a process that is both "open," "fair," and free of manipulation. See e.g., Federal Electric Corp. v. Fasi 56 Haw. 57 (1974).

Secondly, apart from chapter 103, Hawaii Revised Statutes, there is significant public interest in the disclosure of government purchasing information, to ensure that there is no favoritism in the contract award process and that contracts are being let to a qualified lowest bidder. Without public inspection of unsuccessful bids or unit prices charged to the government, abuse and manipulation of government contract awards may go unchecked. Under these circumstances, the public interest in disclosure is at its zenith, as the core purpose of the UIPA is to open up the government processes to public scrutiny, recognizing that it is the "only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. . 92F-2 (Supp. 1989). Thus, we conclude that disclosure of unit or component prices set forth in the public contract bids of "natural persons" would not constitute a "clearly unwarranted

invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes.

CONCLUSION

Except to the extent that such information may be protected by section 92F-13, Hawaii Revised Statutes, we conclude that under the UIPA, each agency must disclose government records which contain government purchasing information, including all bid results. As we construe section 92F-12(a)(3), Hawaii Revised Statutes, its provisions require that both winning and losing public contract bids be available for public inspection, unless their disclosure would frustrate a legitimate government function. Additionally, we conclude that the disclosure of component or unit prices in a lump sum public contract bid will not "frustrate a legitimate government function." Further, disclosure of such data would not "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Accordingly, the component prices set forth in bids for the rehabilitation of HHA's housing project in Eleele, Kauai, should be available for the inspection of the public, including the lowest bidder.

Hugh R. Jones
Staff Attorney

HRJ:bl

APPROVED:

Kathleen A. Callaghan
Director